example, in the case of a bachelor aged 56, unlikely to marry, to award him, in addition to the full costs of accommodation at an infirmary for the rest of his days (less a small proportion for board and lodging) and an amount which would be fair compensation for his loss of amenities, to give him his future salary in full with no deductions. He then went on to say:—

"Another way of looking at it is to say that he should not be given both the full cost of accommodation at Cheadle Royal and also his full salary; for that again would mean that he would be saving his full salary and spending nothing. In any way there is an overlap if he is given his full salary without deductions."

Counsel for the respondent accordingly contended that a similar risk of overlapping existed in the present case in that the award of $84,000, which was reached by the judge after adding together the three items we have mentioned earlier, was a sufficiently fair and reasonable compensation as a whole for the injuries suffered even if one were to make some provision for extra help.

At one stage of the hearing of this appeal it did not seem sufficiently clear from the arguments submitted by counsel for either side that there was any authority for regarding provision for a servant in circumstances such as these as a separate head of assessment but the case to which we have already referred makes it quite clear that additional expenses likely to be incurred for the rest of his life by the plaintiff by reason of the accident such as extra help in the house (whilst he is at home) and the cost of his accommodation at an institution for the rest of his days, subject to a small deduction for board and lodging, can be taken into account under a separate head of assessment in a case where a person has been so incapacitated, wholly or otherwise, as to compel him to incur such expenses, provided that some deduction is made from the assessment as to loss of future earnings because otherwise he would be saving his full salary and spending nothing.

On the evidence before the trial judge it seems to us that a sufficiently strong case was made out for holding that the appellant herein has, since the accident, required and will, for the rest of his days, require some extra help at home and on the streets though not perhaps to the same extent as a paraplegic. The latter, as in the case of *Tan Heng Lin & Anor.* v. *Tay Choon But* to which reference has already been made, would require a full-time servant but, despite the tragic handicaps to which a totally blind person must necessarily be exposed, he is by no means in the same completely helpless position as a paraplegic.

The appellant, at present, lives with his mother who attends to his needs at home and will, no doubt, continue to do so as long as she is herself sufficiently physically fit. There is no evidence of her actual age or state of health but, doing the best we can on the known facts, it is not unreasonable to expect that she will be able to be of some help to him for the next 10 or 15 years at least. One should also bear in mind that, during the course of time, better facilities for persons like the appellant may become available and that, should the need arise, he should find little difficulty in adjusting himself to his changed living conditions and, by developing his other faculties, learn to do more things for himself, including the acquisition of a marriage partner perhaps in his present affluent position as a result of the award, the interest on which alone far exceeds his monthly earnings.

In all the circumstances, we are satisfied that there was evidence to show that the appellant is at least partially unable to look after himself and is and will remain in need of some additional help though not to the extent of requiring a full-time servant for the rest of his days like a paraplegic. We accordingly consider that the appeal is well grounded so far as this head of assessment is concerned.

Having regard, however, to the quantum of the award already made we do not consider that any amount assessed for the additional expenses likely to be incurred in providing the appellant with some extra help should necessarily be added to the figure already reached by the trial judge, who added together the items for loss of future earnings, for the fractures, and for loss of amenities, so as to increase the award as a whole to any higher figure. In our judgment, having regard to the principles regarding overlapping which we have dealt with earlier, the sum of $84,000 awarded by the trial judge represents a fair and reasonable compensation as a whole to the appellant for the injuries suffered by him and we accordingly do not propose to interfere with that award. The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Murphy & Dunbar; Abishega-Naden & Co.*

PUBLIC PROSECUTOR v. LEONG CHEE MOON & ANOR.

[A.Cr.J. (Abdul Hamid J.) December 2, 1968]
[Seremban — Criminal Appeal No. 32 of 1967]

Criminal Law and Procedure — Trial — Charge of having ammunition without a licence — Onus of proof of existence or non-existence — Arms Act, 1960, s. 3(1).

Evidence — Licence — Onus to prove non-existence of — Prima facie evidence.

This was an appeal against the acquittal of the respondents on a charge of having custody of ammuni-

tion without a licence. The president of the sessions court acquitted the respondents at the close of the prosecution case, *inter alia*, on the ground that no *prima facie* evidence had been adduced by the prosecution to show that the custody of the ammunition was unlicensed.

Held, allowing the appeal: the onus is not on the prosecution to prove non-existence of the licence or to adduce *prima facie* evidence of non-authorisation and therefore in this case the appeal must be allowed and the case be remitted to the trial court for the respondents to be called upon to enter their defence.

Cases referred to:—

(1) *Chng Kok Tow* v. *Public Prosecutor* [1968] 1 M.L.J. 20.

(2) *Khoo Teck Yam* v. *Public Prosecutor* [1955] M.L.J. 112.

(3) *Re Tan Kheng Cheng* [1962] M.L.J. 310.

(4) *Lim Ah Tong* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 158.

(5) *Rex* v. *Oliver* [1943] 2 All E.R. 800.

(6) *John* v. *Humphreys* [1955] 1 All E.R. 793.

(7) *Rex* v. *Ewens* [1966] 2 All E.R. 470.

MAGISTRATE'S CRIMINAL APPEAL.

R. Padmanabhan (Deputy Public Prosecutor) for the appellant.

Edgar Joseph Jr. for the respondents.

Cur. Adv. Vult.

Abdul Hamid J.: This is an appeal by the public prosecutor against the decision of the president of the sessions court who acquitted the respondents on a charge under section 9(a) of the Arms Act 1960. The charge reads as follows:—

"You are jointly charged that you on 9.9.66 at about 12.45 p.m. at Kota Village, in the District of Rembau, Negri Sembilan, in contravention of section 3(1) of the Arms Act 21 of 1960, in that you had in your custody 10,000 rounds of ammunitions without an Arms Licence and you have thereby committed an offence punishable under section 9(a) of the Arms Act 21 of 1960."

Briefly, the facts are — on 9th September 1966 at about 12.45 p.m. Cpl. 29948 Yahya bin Haji Abdul Rahman (P.W.1) was manning a police road block in front of the Kota Police Station with two other constables when lorry No. BC. 2480 was stopped and searched. P.W.1 found that the lorry was loaded among other goods with 19 boxes of ammunition (Exhibit "P.1"). The first respondent was the driver of the lorry and the second respondent was the attendant. On being requested by P.W.1, the first respondent produced some documents relating to the ammunition (Exhibit "P.2A-C"). Finding that none of these documents purported to be a licence to carry the ammunition, P.W.1 detained the lorry and arrested the respondents. "P.2A" was a licence to purchase ammunition issued to Haji Abdul Manap bin Hussin who was not called to give evidence by the prosecution. "P.2B" was a purchase bill issued by the ammunition dealer and "P.2C" was a consignment note issued by Low Pee Lorry Transport Co. Ltd.

The appeal is made on the grounds that —

(a) the learned president of the sessions court —

(i) was wrong in finding on the facts that the respondents were in fact employees of the lorry company, namely, Low Pee Lorry Transport Co. Ltd.

(ii) erred in law in that he held that the respondents were purely acting in the course of their employment as the servant of the carrier to wit the lorry company.

(b) that section 6(2)(b) of the Arm Act has no application in this case.

(c) that, even if section 6(2)(b) applies, the onus is on the respondents to show that they had obtained such permission.

The learned counsel for the respondents submitted that there was evidence that the respondents were employees of the lorry transport company acting in the course of their employment and such evidence could be gathered not only from the evidence of P.W.2, who, on cross-examination, stated that the lorry owners' name was Low Pee Lorry Transport Co. Ltd., the fact that there was a haulage permit which was an "A" category permit and that the first respondent had an "E" category driving licence, but also from the fact that when P.W.1 stopped the lorry, the first respondent was at the wheel and the second respondent was the attendant of the said lorry. The learned counsel further submitted that inference could also be drawn from the Exhibit "P.2A-C". I disagree with the contention.

From the record it seems to me that the learned president misdirected his mind on the facts when he said in his grounds of judgment that "the prosecution went on to prove a little bit further and apparently in favour of the defence by indicating to the court that the respondents were in fact employees of the Low Pee Lorry Transport Co. Ltd." The evidence adduced for the prosecution did not in my mind warrant such a finding. There was also insufficient evidence from which the learned president could infer that the respondents were in fact employees of such company. It would also appear that the learned president was wrong in coming to the conclusion that the respondents were acting in the course of the employment as servants of the lorry company.

The learned president also misdirected his mind on the law when he held that section 6(2)(b) of the Arms Act applies. Section 6(2)(b) of the said Act reads:—

"Notwithstanding the provisions of section 3 —

(b) a person lawfully carrying on the business of an auctioneer or carrier or a servant of such a person acting in the course of his employment, may without holding an arms licence or arms permit have in his possession, custody or control, or convey or carry in the ordinary course of that business arms and ammunition provided that —

(i) such auctioneer or carrier has obtained permission in writing from a chief police officer

to sell by auction or to convey arms and ammunition;

(ii) such auctioneer, carrier or servant complies with all conditions and observes all restrictions subject to which such permission is stated in writing to be granted."

This provision is in the nature of an exception to section 3 of the said Act and before this provision applies it is, I think, necessary that there must be evidence to show that the lorry transport company, that is, the carrier company, had been granted permission in writing by the chief police officer to convey ammunition and that the respondents were servants or employees of the transport company and were acting in the course of the company's employment. Once the prosecution has established that the respondents were in custody of the ammunition which was the subject-matter of a charge, it would then be for the respondents to show that they come within the exception.

The learned counsel further submitted that the prosecution failed to make up a *prima facie* case. It was contended that the onus of proof is on the prosecution and it is a duty of the prosecution to adduce some evidence of non-authorisation.

Let me refer to the statutory provisions upon which the charge was based. Section 9(a) of the Arms Act, 1960 reads:—

"Any person who in contravention of the provisions of this Act —

(a) has in his possession, custody or control, or carries or uses any arm or ammunition without an arms licence or arms permit in that behalf or otherwise than as authorised by such licence or permit or, in the case of ammunition, in quantities in excess of those so authorised;

shall be liable in respect of any such contravention to imprisonment for a term not exceeding seven years or to a fine not exceeding ten thousand dollars, or to both such imprisonment and fine."

and section 3(1) of the said Act reads:—

"Subject to the provisions of this Act and any regulations made thereunder, no person shall have in his possession, custody or control any arms or ammunition unless he is the holder of an arms licence in that behalf granted to him under the provisions of section 4."

Counsel referred to a passage in *Sarkar* on Evidence, 11th Edition, page 917, which reads:—

"As stated by Phipson, 'in the absence of statutory provision, the better opinion seems to be that, in general, some *prima facie* evidence must be given by the complainant in order to cast the burden on his adversary' (Phip. 8th Ed.,, p. 34). This is undoubtedly the most practical or reasonable way of applying the section and it has also been held here that before an accused person can be required to prove the matter within his especial knowledge, there must at least be some *prima facie* evidence against him. (*Raghubar* v. *R.*, *R.* v. *Santha*)."

He also referred to the case of *Chng Kok Tow* v. *Public Prosecutor*.[1] The facts in that case were that "the appellant while driving his motor car with luggage boot filled with vegetables and marine products was stopped by police constables and taken to the police station, where a report was made and a photograph of the car taken. He was charged with (a) using the motor car contrary to section 98(1) of the Road Traffic Ordinance; (b) using the motor car without there being in force in relation to such user third party insurance contrary to section 74(1) of the same Ordinance. At the trial the photograph of the car taken at the police station was not produced. The learned magistrate called upon the appellant for his defence and convicted him on both charges." The learned judge Ali J. held that on the second charge although the subject-matter of this charge was something within the knowledge of the appellant, it was necessary for the prosecution to adduce *prima facie* evidence before the onus by virtue of section 106 Evidence Ordinance would shift to the appellant. The learned counsel indicates that he would also rely on the cases of *Khoo Teck Yam* v. *Public Prosecutor* [2] and *Re Tan Kheng Cheng* [3] referred to as cited in that case. The learned counsel contends that in this particular case it was the tactical onus of the prosecution to prove *prima facie* evidence of the permit. I do not think that the passages cited by the learned counsel for the defence from *Sarkar* on Evidence and also the case of *Chng Kok Tow* v. *Public Prosecutor* are authorities for the contention that it was the tactical onus of the prosecution to prove *prima facie* evidence of the permit or that it was the duty of the prosecution to adduce some evidence of non-authorisation.

Let me first refer to the relevant passage on this point in the learned president's grounds of judgment where he said:—

"There was however not an iota of evidence to show that the lorry company had not obtained such a permission. In my opinion, the onus of proving this fact still rested on the prosecution. The prosecution could have discharged this burden of proof fairly easily, by calling anyone of the responsible officers of the lorry company. In *Lim Ah Tong* v. *Public Prosecutor*, it was held *inter alia* 'in a charge dealing with unlicensed firearms, the duty of the prosecution is to give *prima facie* evidence, that the firearm in the possession of the accused is unlicensed and it is then for the accused to show, if this be the fact, that he is licensed.'

It was therefore under the above circumstances that I found the prosecution had not made out a *prima facie* case against the accused persons, which if unrebutted, would warrant their conviction. Accordingly, I acquitted and discharged the accused without calling upon them to enter upon their defence."

I think the learned president erred in law as to the onus of proof and that he also misconstrued the judgment of the Court of Appeal in *Lim Ah Tong* v. *Public Prosecutor*.[4] The learned judge, Mr. Justice Spenser Wilkinson, delivering judgment of the Court of Appeal in that case, said quite clearly at pages 158/9 as follows:—

"Finally, there is one respect in which the learned trial judge's summing up was rather too favourable to the appellant. He stated that the prosecution must prove that the firearm, which was in the possession of the accused, was unlicensed and that he had no licence to possess it. We think this puts the matter too strongly. The prosecution should give *prima facie* evidence that a firearm in the possession of an accused is unlicensed; but if the accused in fact had a licence this is a matter as much within his own knowledge as the possession of a railway ticket would be in the circumstances described in Illustration (b) to section 106 of the Evidence Enactment and it is therefore for the accused to show, if this be the fact, that he is licensed. (See *Rex* v. *Oliver*)."

The learned judge did not hold that it was the duty of the prosecution to give *prima facie* evidence that the accused did not have a licence or was unauthorised.

I should like to refer to the following passage in *Sarkar* on Evidence, 11th Edition, at pages 921/2, which I think is relevant to the present case:—

"Where in proceedings by the Crown, the act charged is lawful if the defendant had a licence, but otherwise unlawful, the prosecution has not to establish the absence of such licence (*R.* v. *Me Nichol*). When a statute provides that a person shall not do a certain thing unless he has a licence, the onus is on the defendant to prove that he has a licence as it is a fact peculiarly within his own knowledge (*R.* v. *Oliver*). So, on a charge of driving without a licence the onus to prove that defendant had a licence is on him (*John* v. *Humphreys*)."

In *Rex.* v. *Oliver*,[5] the appellant was charged with having sold sugar as a wholesaler without the necessary licence. After the commission of the offences the penalties were increased by an order in the following terms: "Any person guilty of an offence against this regulation being a breach of the control or an offence referred to in paragraphs 1B or 1C of this regulation shall be liable to certain penalties being greater than those previously applicable to such offences." It was held that "whether the appellant had a licence was a fact peculiarly within his own knowledge and proof of the fact that he had a licence lay upon him", and on page 803, Viscount Caldecote L.C.J., after considering a number of authorities, said: "In the circumstances of the present case, we are of opinion that the prosecution was under no necessity of giving *prima facie* evidence of the non-existence of a licence."

This case was applied in *John* v. *Humphreys*.[6] In this case, the driver of a motor car was summoned for driving without a licence contrary to section 4(1) of the Road Traffic Act, 1930, which provides: "A person shall not drive a motor vehicle on a road unless he is the holder of a licence. . . ." The driver did not appear at the hearing of the summons but sent a letter saying that he was guilty. It was not proved that the letter had been written by him and there was no evidence before the justices whether the driver did or did not hold a licence when he drove the motor vehicle. The justices dismissed the information." Lord Goddard C.J. at page 794 said as follows:—

"Counsel for the appellant points out that section 4(1) of the Road Traffic Act, 1930, provides: 'A person shall not drive a motor vehicle on a road unless he is the holder of a licence. . . .'

and when an Act of Parliament provides that a person shall not do a certain thing unless he has a licence, the onus is always on the defendant to prove that he has a licence because it is a fact peculiarly within his own knowledge *R.* v. *Oliver*."

Rex v. *Oliver* was also applied in *Rex* v. *Ewens*,[7] where at page 473 Melford Stevenson J. said:—

"There are several authorities in which reference has been made to the importance of the consideration that the facts which bring a defendant within the ambit of a particular exception, if they are peculiarly or exclusively within the knowledge of the defendant, should be regarded as matters which it is for him to establish and that is not a mere matter of convenience."

And on page 474 his Lordship in considering *R.* v. *Oliver* said:—

"It is important to draw attention to *R.* v. *Oliver*, which arose out of a conviction on an indictment charging the appellant as a wholesaler with supplying sugar on various dates otherwise than under the terms of a licence granted by the then Minister of Food. That was an offence under the Defence (General) Regulations, and there the contention was advanced that the burden laid on the prosecution to establish that there was no licence granted to the appellant to permit him to acquire sugar. The learned deputy chairman of the Middlesex Quarter Sessions told the jury in the summing-up that the onus of proving that the appellant had a licence was on the appellant and that they must accept his direction that the appellant had no licence in view of his silence. That was a passage in the summing-up on which the appeal was founded. Viscount Caldecote C.J., referred to *R.* v. *Scott*, in which a similar question arose under an order made under the Dangerous Drugs Act, 1920, which provided that no person should supply any of the specified drugs unless he was licensed by the Secretary of State to supply the drug. The point was taken at the close of the case for the prosecution that there was no evidence that the defendant was an unauthorised person. Swift J. held that, if the defendant were licensed, it was a fact which was peculiarly within his own knowledge and there was no hardship on him to prove it. He said that:

'It might be very difficult or impossible for the prosecution satisfactorily to prove that he did not possess any one or other of the qualifications which might entitle him to deal with the drug, but the defendant could prove without the least difficulty that he had authority to do it.'

Having referred to those words of Swift J. Lord Caldecote C.J., in giving the judgment of this court said:

'Unless we are satisfied that this decision is clearly wrong, we should think it our duty to follow the decision of Swift J.'

A number of authorities were then canvassed, and Lord Caldecote continued:

'In the circumstances of the present case we are of opinion that the prosecution was under no necessity of giving *prima facie* evidence of the non-existence of a licence.'

That authority appears to us to support and completely justify the view taken by the learned chairman in the present case."

In the light of these authorities, it is my considered opinion that in the circumstances of this particular case the principle in *Reg* v. *Oliver* applies. The onus is not on the prosecution to prove non-existence of a licence or to adduce *prima facie* evidence of non-authorisation.

The appeal is allowed and the case will be remitted to the trial court for the respondents to be called upon to enter their defence.

Appeal allowed.

Solicitors: *Joseph & Son.*

FATIMAH v. MOIDEEN KUTTY

[F.C. (Azmi L.P., Suffian & MacIntyre F.JJ.) December 9, 1968]

[Johore Bahru—Federal Court Civil Appeal No. X65 of 1967]

Land Laws — Land held on temporary occupation licence — Death of licensee — Claim for rent by administratrix — Whether occupier entitled to say that neither the deceased nor the administratrix had title to land at material time — Evidence Ordinance, 1950, s. 116.

In this case the respondent occupied the land which was originally held by the husband of the appellant on a temporary occupation licence. The husband of the appellant died in 1962 and when the Collector of the Land Revenue heard of the death he refused to renew the licence after the end of 1963. The appellant as administratrix claimed rent in respect of the period July 1, 1964 to February 28, 1965. It was held in the magistrate's court and on appeal to the High Court ([1968] 1 M.L.J. 3) that she was not entitled to the rent. She appealed.

Held, dismissing the appeal: (1) whatever may have been the deceased's or the widow's right between the deceased's death and the end of 1963, thereafter as the government had refused to renew the temporary occupation licence neither his estate nor the administratrix had any right of any kind whatever to the land;

(2) section 116 of the Evidence Ordinance did not prevent the tenant from contending that neither the deceased nor the widow had any title to the land in respect of the material period, because he was not saying that the deceased or the widow had no title at the beginning of the tenancy. All he did was to contend that the deceased's title had come to an end.

Cases referred to:—

(1) *Papoo* v. *Veeriah* [1966] 1 M.L.J. 127.

(2) *Kumar Krishna Prosad Lal Singha Deo* v. *Baraboni Coal Concern Ltd. & Ors.* A.I.R. 1937 P.C. 251.

(3) *Rev. Luckman Chaplain* v. *Pearey Lal* A.I.R. 1939 All. 670.

The following cases were also cited in argument: *Ban Seng* v. *Yap Pek Soo* [1967] 2 M.L.J. 156, *Tay Cheo* v. *Chow Ngia* [1967] 1 M.L.J. 281, *Govindaraju* v. *Krishnan* [1962] M.L.J. 334, *Bhavan Lalu* v. *Umar Mohamed Bhaiji* A.I.R. 1927 Bombay 129, *Hee Cheng* v. *Krishnan* [1955] M.L.J. 103.

FEDERAL COURT.

D.A. Devadason for the appellant.

Tara Singh Sidhu for the respondent.

Cur. Adv. Vult.

Suffian F.J.: I have had the advantage of reading my brother MacIntyre's judgment and I too think this appeal should be dismissed.

The widow (appellant) obtained a warrant of distress in respect of rent alleged to be due for the period beginning on 1st July, 1964, and ending on 28th February, 1965. On the tenant (respondent) objecting, the learned magistrate held that she was not entitled to the rent and on appeal Ali J. agreed with the learned magistrate. With respect I also agree.

Immediately before the issue of the temporary occupation licence to the deceased, the land concerned was State land. After the issue of the temporary occupation licence, the land was still State land, but the deceased had a licence to occupy it temporarily. By law this licence was not transferable and I agree with Good J. in *Papoo* v. *Veeriah* [1] that the licence was not transmitted to the widow on the licensee's death and he died on 10th August, 1962. Thereafter the collector renewed the licence for the year 1963 in the deceased's name. When he knew of the deceased's death, he refused to renew it after the end of 1963. Whatever may have been the deceased's or the widow's right between the deceased's death and the end of 1963, thereafter because Government refused to renew the temporary occupation licence in the name of the deceased or any one else, neither his estate nor she had any right of any kind whatever to the land. Section 116 of the Evidence Ordinance, 1950 does not prevent the tenant from contending that the deceased or the widow had no title in respect of the material period beginning on 1st July, 1964, and ending on 28th February, 1965, because he was not saying that the deceased or the widow had no title at the beginning of the tenancy. All he said was that neither the deceased nor the widow had any title thereafter. Sir George Rankin when giving the advice of the Privy Council in *Kumar Krishna Prosad Lal Singha Deo* v. *Baraboni Coal Concern Ltd. & Ors.* [2] said at page 255 that section 116 of the Indian Evidence Act (which is identical with our section 116) does not "prevent a tenant from pleading that the title of the original lessor has since come to an end". And that was exactly what happened here. The tenant contended that the deceased's title had come to an end.

The facts in the instant case are almost similar to the facts in *Rev. Luckman Chaplain* v. *Pearey Lal.* [3] There a landlord sued for arrears of rent in respect of a period of four months — February to May, 1938 — for a bungalow let to the defendant. The bungalow being within a cantonment area was held on a tenure called the cantonment tenure under which the Government was authorized to resume possession of the land and also of any house